Supreme Court, U. S.
FILED
SEP 13 1977
MICHAEL RODAK, JR., CLERK

No. 76-1630

In the Supreme Court of the United States

OCTOBER TERM, 1977

HERMAN CHANEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 549 F. 2d 1306.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1977. A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 28, 1977. On April 18, 1977, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 23, 1977, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the manner in which the government presented evidence to the grand jury was so fundamentally unfair as to require dismissal of the indictment.

STATEMENT

On May 30, 1974, a federal grand jury sitting in the United States District Court for the District of Arizona commenced an investigation of an allegedly false claim made by petitioners as officers of National Housing Industries, Inc. ("NHI"), against the United States in the Court of Claims. The grand jury heard the testimony of five live witnesses: F.B.I. Agent Crowley (an accountant and the chief investigator in this case), three employees of NHI, and a notary public. A court reporter recorded each witness' testimony. At the expiration of its term the grand jury was discharged without having voted whether or not to indict petitioners (Pet. App. 2a).

On October 15, 1975, a second grand jury indicted petitioners for violations of 18 U.S.C. 371, 1001, and 2. The evidence presented to this grand jury was not transcribed. It consisted of a summary by Agent Crowley of the testimony given before the first grand jury (including his own), supporting documentary evidence, and responses by Agent Crowley to questions from the grand jurors. On petitioners' motion the district court dismissed the indictment because the testimony consisted of hearsay and was not transcribed (Pet. App. 2a-3a).

A third grand jury was convened on April 15, 1976. With a court reporter present, the government presented evidence upon which the grand jury indicted petitioners on three counts of conspiracy to make and the making of false, fictitious, or fraudulent statements in a matter before a department or agency of the United States, in violation of 18

U.S.C. 371, 1001, and 2. This time Agent Crowley read to the grand jury transcripts of the sworn testimony given before the first grand jury, presented documentary evidence, and answered questions from the grand jurors. Before presenting this evidence the government apprised the grand jury of the existence of exculpatory matters, including evidence tending to impeach the credibility of some of its witnesses (Pet. App. 10a-11a). The district court dismissed this indictment as well, ruling that, since the first grand jury had heard live testimony, a subsequent grand jury had to be given the same opportunity before it could return an indictment (Pet. App. 3a-4a).

On the government's appeal, the court of appeals reversed and reinstated the indictment, holding that "[r]eading transcripts of sworn testimony, rather than presenting live witnesses, simply does not constitute, on the facts of this case, 'fundamental unfairness' or a threat to 'the integrity of the judicial process' " (Pet. App. 10a). The court also ruled "that by dismissing the indictment the district judge overstepped the bounds of his [supervisory] authority and improperly interfered with decisions within the domain of the prosecutor" (*id.* at 4a).

ARGUMENT

1. This petition challenges the court of appeals' reversal of the district court's dismissal of the indictment on grounds of governmental misconduct in the manner in which it presented evidence to the grand jury. That reversal puts petitioners in the same position as if the district court had denied their motion in the first instance. Such a denial would not have been subject to interlocutory appeal (see *Cobbledick* v. *United States*, 309 U.S. 323; *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327), and there is no reason for this Court to grant interlocutory review of the

court of appeals' decision. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, any of petitioners are convicted and their convictions are affirmed, they will then be able to present all their contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

2. In any event, the court of appeals, upon whose opinion we principally rely, correctly reversed the district court's dismissal of the indictment. Petitioners erroneously assert (Pet. 8-9) that it was "fundamentally unfair" for the government to have Agent Crowley read transcripts of sworn testimony given by three witnesses[1] before the first grand jury, rather than to call those witnesses anew. The gist of petitioners' argument is that the credibility of two of those witnesses was suspect and that the grand jurors should have been able to observe their demeanor. But the grand jury was, in fact, informed that these witnesses had given prior inconsistent statements, and there can be no suggestion here that the government followed the course it did in order to hide anything from the grand jury. Furthermore, Agent Crowley gave live testimony, supplied supporting documents, and was available to answer questions.

Moreover, the fact that some of the evidence took the form of hearsay did not invalidate the indictment. In *Costello* v. *United States*, 350 U.S. 359, 363, this Court ruled:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.[2]

[1]The testimony of the fifth witness who appeared before the first grand jury (the notary public) was not read because it lacked substantive value (Pet. App. 3a, n. 1).

3. Petitioners also assert (Pet. 9-11) that the court of appeals applied an incorrect standard of review in assessing the propriety of the district court's dismissal of the indictment in this case. In petitioners' view, the decision below erroneously "confines proper judicial intervention [in matters involving the grand jury] to an exceedingly small class of cases, *i.e.*, those where the conduct in question *requires* dismissal of the indictment" (Pet. 11; emphasis in original). We know of no authority that would permit a district court to dismiss an indictment when it was *not* required, or that would compel a court of appeals to accept a district court's dismissal at face value. Contrary to petitioners' claim, the decision below

[2]This Court has consistently reaffirmed the principles of *Costello*. See *United States* v. *Calandra*, 414 U.S. 338, 345 ("[A]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, * * * or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination, *Lawn* v. *United States*, 355 U.S. 339 (1958)."). Indeed, indictments have been upheld even where the prosecutor concealed evidence which would undermine a witness' credibility, since at the trial on the merits the defendant will have the opportunity "to expose all the facts bearing upon his guilt or innocence." *Loraine* v. *United States*, 396 F. 2d 335, 339 (C.A. 9), certiorari denied, 393 U.S. 933.

does not constitute an "abdication of the judicial function" (Pet. 11). Rather, it represents a recognition by the court of appeals that "[j]udges are not free * * * to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' " *United States* v. *Lovasco*, No. 75-1844, decided June 9, 1977, slip op. 7 (quoting from *Rochin* v. *California*, 342 U.S. 165, 170).

The decisions from the Second Circuit cited by petitioners (Pet. 9-10) do not conflict with the decision below. That line of decisions, culminating in *United States* v. *Estepa*, 471 F. 2d 1132, and representing exercises by the Second Circuit of its supervisory power, cautions federal prosecutors in that circuit to forego unnecessary reliance on hearsay evidence in the grand jury and to advise the grand jury that the evidence presented to it is hearsay when such is the case. In *Estepa* the court ordered an indictment dismissed when the prosecutor ignored the court's repeatedly expressed admonitions and when the grand jury had been misled about the hearsay nature of the evidence it had heard. The court ruled that the use of hearsay evidence was inappropriate only where the jury has been misled or when there is a " 'high probability that with [direct] rather than hearsay testimony the grand jury would not have indicted' " (*id.* at 1137). Here, by contrast, the grand jury was advised that it was hearing transcribed, sworn testimony from an earlier proceeding. It also knew that two of the witnesses whose testimony was read had earlier given prior inconsistent statements. It also heard the live testimony of Agent Crowley, the government official most familiar with the case. Thus, even applying the *Estepa* test, the jury was not misled and there was no "high probability" in this case that the grand jury would not have indicted had it heard live rather than hearsay testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.